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LIABILITY OF LANDOWNERS TO CHILDREN ENTERING WITHOUT PERMISSION.

IS a landowner responsible, so far as the condition of his premises is concerned, to children entering without permission, when he would not be liable to adults under similar circumstances?

To adults entering without permission [1] the landowner owes some legal duties. He is under a duty not to intentionally inflict harm upon a trespasser, save when he is exercising within legal limits the rights of defence and expulsion. He is also, by the better view, under a duty to avoid harming the trespasser by negligent acts which result in actively bringing force to bear upon the trespasser. In other words, he is under a duty to use care not to harm the trespasser by bringing force to bear upon him. It is a mooted question whether this duty is confined to cases where the presence of the trespasser is known to the landowner. Some authorities hold that the owner may, in special circumstances, be under a duty to use care to ascertain whether trespassers are present before he sets in motion a force which would be likely to

[1] The words "without permission" are intended to exclude the case, not only of the "business visitor" and the "invited person," but also that of the "licensee;" whether the license be expressed in words or is a "tacit license" inferred as matter of fact from a failure to object to previous entries. Cases where the existence of an actual, though tacit, invitation or license can be found as a matter of fact, do not fall within the scope of this article. "Implied invitation," in the sense of "implied solely by construction of law," will be referred to later.

endanger any such persons if within reach.[1] But the alleged duty, if admitted, is material only when it is sought to make the landowner liable for actively bringing force to bear upon the trespasser.

On the other hand, the landowner is under no duty to have his land in safe condition for adult trespassers to enter upon. The law does not oblige him to keep his premises in repair for the benefit of a trespasser. The latter has ordinarily no remedy for harm happening to him from the nature of the property upon which he intrudes; he takes the risk of the condition of the premises. It is not negligence in a landowner to use his land for his own convenience in a manner which may occasion danger to future trespassers thereon.[2] It is no breach of duty to a trespasser "that a man's premises were in a dangerous state of disorder, whatever the consequences to the former." Nor is there any obligation to warn trespassers of dangers not readily apparent (assuming, of course, that the dangers were not prepared with intent to harm trespassers).[3] If the land is adjacent to a public highway, the owner may be liable for making changes on his land which endanger the safety of travellers who, notwithstanding their use of due care, accidentally deviate from the highway limits. But, with this exception, the owner is not responsible for the condition of his premises to persons entering thereon without permission.[4]

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[1] For some of the recent conflicting authorities on this question, see Lindsay *v.* Canadian Pacific R. R. Co., 1896, Vermont, 35 Atlantic Rep. 513; Louisville & N. R. Co. *v.* Vittitoc's Adm'r, 1897, Kentucky, 41 Southwestern Rep. 269; Gunn *v.* Ohio River R. Co., 1896, West Virginia, 26 Southwestern Rep. 546; Pickett *v.* Wilmington & W. R. Co., 1895, 117 North Carolina, 616; Texas & P. R. Co. *v* Breadow, 1896, Supreme Court of Texas, 36 Southwestern Rep. 410; St. Louis, etc. R. Co. *v.* Ross, 1896, Arkansas, 33 Southwestern Rep. 1054; St. Louis, etc. R Co. *v.* Bennett, 1895, 69 Fed. Rep. 525; Sheehan *v.* St. P. & D. R. Co., 1896, 76 Fed. Rep. 201; Wabash R. Co. *v.* Jones, 1896, 163 Illinois, 167. For statutes requiring railroad companies to keep some person on the locomotive "always on the lookout ahead," see Milliken & Vertrees' Code, Tennessee, s. 1298, subs. 4; Sandels & Hill, Dig. Arkansas, s. 6207.

[2] Bishop's Non-Contract Law, s. 845.

[3] "As towards trepassers . . . there is no implied representation of safety at all, and therefore no duty to warn of any concealed source of danger. . . ." Clerk & Lindsell on Torts, 2d. ed. 422.

[4] To the above general rule, a seeming exception is presented by certain cases relative to damage done by ferocious animals. The landowner has been held liable to an adult trespasser for harm done by ferocious animals which he keeps upon his premises, even in cases where the animals were not kept for the purpose of attacking trespassers. Decisions such as Marble *v.* Ross, 1878, 124 Mass. 44, may appear inconsistent with the general doctrine as to the non-liability of the owner for harm done to adult trespassers by the condition of the premises. On principle, it is not easy to distinguish between responsibility for animate and inanimate property. The difference may possi-

Such, in brief, are the legal relations between landowners and adults entering without permission. Is there any difference in the case of children so entering? No doubt the landowner's duty to refrain from the intentional or negligent infliction of harm by affirmative acts done after the entry, exists in the latter case as fully as in the former. The vexed question is, whether he is under any liability as to the condition of the premises. If the intruder suffers harm by coming in contact with dangerous objects while the landowner remains passive, is the latter responsible for damage thus suffered by reason of the dangerous condition of his premises but without his active intervention?[1] Probably it will not be contended that the owner is liable even to children for harm happening from the condition of premises which have been left by him in their so-called "natural" state.[2] But suppose that changes are made by him in the course of a beneficial user; and that these changes, though in all other respects reasonable and lawful, have the double effect of attracting young children to the land and at the same time exposing them to serious danger if they yield to the attraction. Is the owner, who knows, or ought to know, the situation, under a duty to take special precautions for the safety of such children, either by keeping them out or by protecting them after entry; and, if he does not take such special precautions, is he liable to children who enter and are hurt?

Upon the question thus presented there is, in this country, a

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bly be due to an "accident of history." The law as to responsibility for animals crystallized early; and more stringent rules were established as to the owner's liability than now generally prevail as to his responsibility for inanimate chattels. There was, perhaps, a tendency to completely identify the owner with the animal. American judges who have refused to follow the lead of Fletcher *v.* Rylands, appear inclined to regard some of the present doctrines as to absolute responsibility for animals as a survival of early conceptions, and as constituting a class of exceptions not to be extended by analogy. In this connection, see Ray on "Negligence of Imposed Duties — Personal," pp. 585, 586.

[1] In a note at the close of this discussion, there will be found collected upwards of sixty cases where attempts have been made to hold landowners liable to children who entered without actual invitation or permission. In five-sixths of these cases there is no pretence that the harm to the child was caused by the landowner's setting force in motion, or keeping force in motion, while the child was on his premises. On the contrary, in this large proportion of cases the harm occured by the child's coming in contact with the land, or with water covering the land, or with objects on the land which were in a state of rest, or with objects which were set in motion by the child himself or by his companions.

[2] "An allurement seems to be some attraction added to land, not the mere effect of land in its natural state." 1 Beven on Negligence, 2d ed. 189, note 1.

remarkable conflict of authority.[1] Although there are earlier cases bearing on the subject, there was little direct discussion of it before 1870; and it is probable that the general interest of the profession in the question was first excited by the decision of the U. S. Supreme Court in 1873, in Sioux City etc. R. R. *v.* Stout,[2] one of the earliest of the series, now known as "The Turn-table Cases." In later years the decisions have come thick and fast; but unanimity of judicial opinion has not been attained.

The problem which has occasioned such a wide divergence of opinion is not easy of solution. Arguments of weight have been adduced in favor of either view. But, in addition to these really important considerations, we find in use a set of phrases which are capable of being understood, and frequently are understood, as affirming positions which seem to us utterly untenable. These phrases have made such a profound impression on some judges as to obscure the vital point of inquiry and thus prevent a careful consideration of the real question at issue. It is desirable, at the outset, to ascertain what, if any, justification there is for the positions which these phrases are sometimes supposed to affirm. And if those positions are found to be untenable, this misleading phraseology should be discarded in the further discussion of the main question.

It is said that the landowner, in a case like that we have supposed, must be regarded as having invited, allured, or enticed the children to come upon his premises and submit themselves to the perils there encountered. It is alleged that he is in the position

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[1] In other countries the question has not received so much judicial discussion. Various English cases have been cited in the American courts, but none of them appear to be direct decisions. From the general tone of the English courts upon related topics, the inference would seem adverse to the child's claim in the hypothetical case stated in the text. The non-appearance of such cases in the English reports may be due to an opinion in the profession that such actions are not maintainable. For somewhat conflicting observations of English authors, see Clerk & Lindsell on Torts, 2d ed. 436, 437; 1 Beven on Negligence, 2d ed. 183–190.

The point has been more considered in the Scotch courts, but the law there does not seem decisively settled. See Glegg on Reparation, 231–232, 245–248; and Guthrie Smith on Damages, 144–147.

In Australia, a recent decision of the court of New South Wales is favorable to the landowner. Patterson *v.* Borough of Woollahra, 1895, 16 New South Wales Law Reports — Cases of Law, 229. There a boy was hurt while playing with a crane left in an abandoned quarry and so ineffectually fastened that children had repeatedly undone the fastening and played with the crane. See also Slade *v.* Victorian Ry., 1889, 15 Victorian Law Reports, 190.

[2] 17 Wallace, 657.

of one who sets a trap for the innocent; and he has even been spoken of as an active aggressor. The natural meaning of these strong expressions is, that the landowner actually intended and desired that the children should come upon his land, and that the changes on his premises were made by him for the express purpose of attracting children to encounter peril. If such were the fact, it may readily be conceded that the case of the landowner would be as hopeless as that of Herod. But no sane man believes that people who are making beneficial use of their own land do in fact entertain the intention of thereby alluring children to their destruction.[1] The persons who use these expressions will, when cross-examined, admit that the "invitation" does not exist in actual fact, but only by construction of law.[2] So too as to the "intent" naturally implied by these phrases; they will either disclaim any such imputation,[3] or they will say that the

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[1] "The excavation for a reservoir was not made and filled with water for a trap, but for lawful use by the defendants on their own land. The work of filling it was not carried on for the purpose of attracting boys there and giving them sport and pleasure, but for the improvement and beneficial use of the city's land. . . . It was not a case of setting a trap for the children. . . . It was the ordinary case of a landowner managing, within the boundaries of his own land, his own property in his own way for his own use and benefit. . . ." Allen, J., in Clark *v.* Manchester, 1882–1883, 62 New Hampshire, 577, pp. 580–581.

[2] See Harriman *v.* Pittsburgh, etc. R. Co., 1887, 45 Ohio State, 11, pp. 30, 31; Tarlton, C. J., in Texas & P. R. Co. *v.* Brown, Texas, 1895, 33 Southwestern Rep. 147.

The question whether the child should be regarded as *licensed* by implication or construction of law is not specially discussed here. The advocates of the child have generally seen fit to put their case on the higher ground of implied *invitation.* The objections against implying invitation by construction of law may also be urged against implying license. There is no more reason for upholding one of these fictions than for upholding the other.

It has already been explained that cases where the existence of an actual, though tacit, invitation or license can be found as matter of fact, do not fall within the scope of this article. It would therefore be irrelevant to discuss here the question, what evidence is sufficient to justify a finding that there was in fact an invitation or license. But it may be remarked, in passing, that some decisions seem to have gone too far; viz., the cases which tend to obliterate the distinction between invitation and license regarding permission as the full equivalent of invitation; also the cases tending to the view that a mere failure to prohibit or punish trespassing confers on all future comers the fullest right that can exist in a person expressly licensed to enter. In this connection, see Price *v.* Atchison Water Co., 1897, Kansas, 50 Pacific Rep. 450, p. 452.

[3] We must do the Supreme Court of Minnesota the justice to say that, in their initial opinion on this subject, it was expressly admitted that the defendant did not leave the turn-table unfastened, "for the purpose of injuring young children." The learned court, however, made use of very strong expressions, which have sometimes been referred to by other courts without any mention of the accompanying disclaimer. In the Minnesota case, Mr. Justice Young said: "Now what an express invitation

intent exists in law, though not in fact; i. e., that its existence must be presumed by some process of legal construction. They will rely upon the presumption that "every man intends the probable consequences of his acts." It is alleged that the probable consequence of certain modes of using land is to attract children, and to result in harm when they yield to the attraction. The landowner, it is said, ought to know the above facts, and ought to foresee that a harmful result will follow in occasional instances. If he ought to foresee such a result, it is argued that the law ought to regard him as if he had actually foreseen it. And then it is virtually claimed that actual knowledge and foresight of the probable result is equivalent to actual intention or desire that such result should take place. Right here we take issue. Failure to advert to probable consequences, or even knowledge that certain consequences are probable, is not equivalent to intent or desire that such consequences shall follow. In such cases it may, or may not, be right to hold the landowner liable on the ground of negligence. That is a separate question, which will be discussed later. But it is not right to hold him liable *on the ground of intention*, where no intent actually existed. Nor is it right, while considering whether to hold him on the ground of negligence, to throw into the scale against him the argument that he must be regarded as having actually intended the result. This sort of reasoning, carried to its logical extreme, would annihilate the distinction between negligence and intention. It also blurs the distinction between knowledge and intent. "Intention," says Markby, "is the attitude of mind in which the doer of an act adverts to a consequence of the act and desires it to follow. But the doer of an act may advert to a consequence and yet not desire it; and therefore not intend it." [1] The so-called presumption, "that every man intends the probable consequences of his acts," is not a rule of law "further or otherwise than as it is a rule of

would be to an adult, the temptation of an attractive plaything is to a child of tender years." Also: "The defendant therefore knew that by leaving this turn-table unfastened and unguarded, it was not merely inviting young children to come upon the turn-table, but was holding out an allurement, which, acting upon the natural instincts by which such children are controlled, drew them by those instincts into a hidden danger; and having thus knowingly allured them into a place of danger, without their fault (for it cannot blame them for not resisting the temptation it has set before them) . . ." Keffe *v.* Milwaukee & St. Paul R. Co., 1875, 21 Minn. 207, pp. 211, 212.

[1] Markby's Elements of Law, 3d ed. s. 220. Compare Holmes on the Common Law, p. 134: "But when you prove knowledge you do not prove intent."

common-sense."[1] In other words, the "presumption" is, at most, only a *prima facie* presumption; and may be strong, weak, or utterly inefficacious, according to the varying situations where the attempt is made to apply it. If the result in question is one which men are frequently prone to desire, and there is no assignable reason for the act except the single one of accomplishing that particular result, the inference that the result was intended is strong. If, on the other hand, the result is one which not one man in ten thousand desires, and there is another assignable reason for the act, and one moreover by which men are generally influenced and which is amply sufficient to account for the act, the inference is, practically speaking, reduced to zero. A man who builds a cistern and leaves it open at the top, generally intends that rain water shall accumulate therein. He does not generally intend that people shall fall into the water thus collected and be drowned. There may, in some instances, be room to argue that he ought to be held liable for the latter result on the ground of negligence; but it is an entire perversion of language, and a total confusion of legal distinctions, to say that he is liable on the ground that he intended such a result. It is not just to enhance the alleged moral obliquity of his conduct by imputing to him an intent which exists only by construction or fiction. Mr. Bishop has well said that "in reason we cannot first draw an evil intent from an act, and then enhance the evil of the act by adding this intent back again to it."[2]

A similar instance of misleading phraseology is to be found in the oft quoted statement: "Now what an express invitation would be to an adult, the temptation of an attractive plaything is to a child of tender years."[3] This sentence (though probably not so intended by its learned author) is capable of being understood as an assertion that the landowner who introduces upon his land some object which may present to children the attraction of a plaything, should be regarded as thereby intending to induce children to enter upon his land, just as much as if he had expressly invited them; the only difference being that in the latter case his intention is evidenced by words, and in the former by conduct. Such an inference as to intent might perhaps be well founded if the object was of such a nature that it could serve no

[1] 2 Stephen, Hist. Crim. Law of England, 111.

[2] 1 Bishop, New Crim. Law, s. 735, par. 2.

[3] Young, J., in Keffe *v.* Milwaukee & St. P. R., 1875, 21 Minn. 207, p. 211.

other purpose than that of a plaything (and if the landowner had no children of his own to play with it). But such a state of facts is not found in the class of cases now under consideration, nor did it exist in the case pending before the learned judge by whom the above statement was enunciated. The so-called attractive "plaything" of the landowner will generally prove to be an object whose introduction upon the land is a practical necessity to the landowner, and often to the entire community: e. g., the sawmill of the lumberman, the forge of the blacksmith, the threshing-machine of the farmer, or the turn-table of the railroad. The effect of such objects upon children may be to attract them to the land. But the effect upon the children does not always furnish satisfactory evidence that such objects were placed upon the land for the purpose of producing that effect. The landowner had another and a sufficient purpose for the introduction of such objects; a purpose the accomplishment of which would be impeded (and in some cases absolutely frustrated) by the presence of his neighbor's children upon his land. Whether the landowner should be held liable on the ground of negligence — i. e., whether the law should impose upon him a duty of using special care to guard his neighbor's children from dangerous contact with these attractive objects, — is a fairly arguable question, to be considered hereafter. but there is no room whatever to hold him liable on the ground of intent, either actual or constructive. And as there is no justification for imputing to him "intent" in the ordinary signification of that term, a *fortiori* there is no reason for imputing it in the sense of ulterior intent or motive. It should be added that the sentence in question contains another word which is capable of misconstruction. When we speak of "temptation" in such a connection, it is well to explain whether we refer to things done with actual intent to induce others to act, or to things done with an entirely different purpose, but which may have the incidental and unintended effect of inducing action by others. If the word is used in the latter sense, the law would seem to be correctly stated by Mr. Justice Holmes in the recent case of Holbrook *v.* Aldrich:[1] "Temptation is not always invitation. As the common law is understood by the most competent authorities, it does not excuse a trespass because there is a temptation to commit it, or hold property owners bound to contemplate the infraction of

[1] 1897, 168 Mass. 15, p. 16.

property rights because the temptation to untrained minds to infringe them might have been foreseen."

In some, perhaps in most, of the opinions indulging in this talk about "allurement," etc., the courts have also said that the defendant has been negligent and that he is liable on the ground of negligence. If, then, as a general rule, defendants are professedly held liable on the ground of negligence, and if full damages are recoverable for negligence, why spend time in criticising the language of the court implying that the same result might also be reached on another and distinct ground, viz., implied intention? The answer is twofold. First: Because all this talk implying the existence of intent tends to obscure the issue as to negligence. Second: Because this same talk tends to prejudice the defendant in the decision upon the issue of negligence.

Some of the errors upon which we have been commenting may be attributed, not only to the overstraining of a presumption, but also to the misapplication of a frequently cited case; viz., Townsend *v.* Wathen.[1] It seems to be supposed that either the point there decided, or the language of the court, sustains the use (in the present controversy) of the phrases we deem so objectionable, and especially the comparison of the landowner to one "setting a trap" for the innocent. But this supposition is erroneous, as a succinct statement of that case will demonstrate. The declaration alleged that the defendant, "wrongfully intending to catch, maim, and destroy the plaintiff's dogs," placed traps, baited with flesh, in a wood on defendant's land, near divers highways and near the grounds of the plaintiff; and that the plaintiff's dogs were, by the scent of the flesh, enticed from the said highways and grounds to the traps, and were caught therein and wounded. A verdict was returned to the plaintiff, and a motion for arresting judgment was refused. The defendant also moved to set aside the verdict as against evidence; contending "that there was no evidence that the traps were purposely set to catch the plaintiff's dogs," or "that the traps were set for the purpose of catching dogs in general." The evidence on these points at the trial was, in brief: that the defendant had long maintained the traps in the situation alleged in the declaration; that in one year no less than seven dogs had been taken and killed in these traps; that the defendant had known and approved of it; and that the defendant allowed his

[1] 1808, 9 East, 277.

gamekeeper one shilling for every dog killed in the traps. The court, of course, held that the above evidence was sufficient to justify the jury in finding that the defendant set the traps with the intent to catch and maim the plaintiff's dogs. Two of the judges, in their opinions, advert to the presumption that every man must be taken to contemplate the probable consequences of the act he does. But the judges did not say that this presumption alone would justify in every case a finding that the defendant actually intended or desired the result which he ought to have foreseen as probable. This question was not before the court; for, in that case, there was plenary evidence of actual intent without calling in the aid of any presumptions. The decision in Townsend *v.* Wathen is not in point to establish the liability of a railroad to a child attracted by a turn-table upon defendant's premises, unless it is proved that the railroad company maintained the turn-table with the express intention of catching and maiming the children of the neighborhood, and that the directors were in the habit of rewarding the section foreman at a certain rate per head for each innocent babe thus slaughtered. When Lord Ellenborough intimates that there is no difference between "drawing the animal into the trap by means of his instinct which he cannot resist" and "putting him there by manual force," the learned judge is evidently speaking, in both cases, in reference to results intentionally produced; i. e., acts done with the intent of bringing the animal into the trap.

The view just suggested as to the scope of the decision in Townsend *v.* Wathen, and its inapplicability in favor of child plaintiffs in turn-table cases, is fully sustained by the opinion in the very recent English case of Ponting *v.* Noakes.[1] The plaintiff's horse was poisoned by eating the leaves of a yew-tree which grew upon the defendant's land, and which the horse could reach only by stretching his neck over the boundary line. It was held that the defendant was not liable. Mr. Justice Collins, in the course of his opinion,[2] said: "Does it, then, make any difference that a yew-tree is likely to tempt a horse to trespass? I think not, unless it was proved that it was put or kept there for the purpose of enticing the animal to his destruction, as was done in the case of Townsend *v.* Wathen,[3] cited by Mr. Chitty. The wrongful intention was the gist of that action. If such intention is disproved, it follows, if

[1] L. R. (1894), 2 Q. B. 281. [2] Page 290. [3] 9 East, 277.

the above reasoning is correct, that there can be no liability." The decision in Townsend *v.* Wathen is also fairly summarized in the following extract from the opinion of Mr. Justice Peckham in Walsh *v.* Fitchburg R. Co.[1] "... it was held that a man must not set traps of a dangerous description in a situation to invite, and for the particular purpose of inviting, his neighbor's dogs, as it would compel them, by their instinct, to come into the trap. The act of the defendant to that case was not done in the prosecution of his immediate and proper business, but, as the court held, was a mere malicious attempt, successful in its result, to entice his neighbor's animals upon his property, and the enticement was effected by the means spoken of."

"There is no difficulty at all in holding parties liable for any intentional mischief, however it may be covered up. If they prepare means of destruction for the malicious purpose of destroying life or inflicting injuries, there is no room for the application of the doctrine of negligence, and the act which they mean to bring about is none the less their act because brought about indirectly.[2] ... But where injury arises to a person from the alleged neglect of one, in doing his lawful business in a lawful way, to provide against accident, the question arises at once whether he was under any legal obligation to look out for the protection of that particular person, under those particular circumstances. For the law does not require such vigilance in all cases, or on behalf of all persons."[3] Neither the ownership nor the use of a thing necessarily entails on the owner or user liability for damages suffered by a third person coming in contact therewith.[4] "I think," said Lord Lee, "it is well settled that the mere property of a subject from which damage arises is not sufficient by itself to render the proprietor responsible for the damage. There must be negligence on the part of the proprietor. He must have failed to perform some duty which the circumstances imposed upon him and the neglect of which led to the accident."[5] "If there be no duty, the question

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[1] 1895, 145 N. Y. 301, p. 309.

[2] "In such cases the liability is not based upon the assumption that the owner owes a duty to the uninvited person to keep his premises reasonably safe, but upon the fact that he owes a duty to such person not to intentionally injure him. The failure to observe this distinction has led to much confusion." Denman, J., in Dobbins *v.* Missouri, etc. R. Co., Texas, 1897, 41 Southwestern Rep. 62, p. 64.

[3] Campbell, J., in Hargreaves *v.* Deacon, 1872, 25 Mich. 1, p. 4.

[4] See Bishop, Non-Contract Law, s. 828.

[5] Ross *v.* Keith, 1888, 16 Scotch Session Cases, 4th Series, 86, p. 91.

of negligence is not reached, for negligence can in law only be predicated upon a failure to use the degree of care required of one by law in the discharge of a duty imposed thereby." [1] " . . . if no duty, then no negligence, because the latter must have the former as its inevitable and indispensable predicate." [2]

If, then, the landowner is not to be held liable on the ground of intentional allurement where no intent in fact exists, the plaintiff must convince the court that the case is one where the law imposes a duty upon the landowner to exercise care for the special protection of the class of persons to which the plaintiff belongs. Does the law impose such a duty? Must the owner at his peril keep his land "free from objects by which discretionless, unattended children might be attracted and harmed," or so guard his premises as to keep such children out or protect them after entry? [3] Does the common law impose upon the owner of property the duty to use care to keep out, or protect, children of tender years attracted to his premises by the nature of the business carried on there? The question is not settled by authority; there being a remarkable conflict of decisions. It is, therefore, to be considered upon principle.

Upon the crucial inquiry whether the law should impose such a duty upon the landowner, there are considerations of undoubted weight to be urged in favor of either view. A balance must be struck between the benefit to the community of the unfettered freedom of owners to make a beneficial use of their land and the harm which may be done in particular instances by the use of that freedom. The true ground for the decision is policy; i. e., expediency, in the Benthamic sense of "the greatest good to the greatest number;" "and the advantages to the community, on the one side and the other, are the only matters really entitled to be weighed." [4]

On the one hand, it is the policy of the law to establish rules tending to preserve life, and to protect human beings from serious bodily harm. And this laudable purpose seems frustrated, *pro tanto*

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[1] Denman J., in Dobbins *v.* Missouri R. Co., Texas, 1897, 41 Southwestern Rep. 62, p. 63.

[2] Sherwood, J., in Barney *v.* Hannibal & St. J. R. Co., 1895, 126 Missouri, 372, pp. 391, 392.

[3] See Finley, J., in Missouri, etc. R. Co. *v.* Dobbins, 1896, Texas, 40 Southwestern Rep. 861, p. 863.

[4] See Mr. Justice Holmes in 8 HARVARD LAW REVIEW, pp. 4, 6, 9.

by permitting a landowner to pursue with impunity a mode of user which he knows, or ought to know, is likely to occasionally result in the suffering of great harm on the part of some of his neighbor's children. The fact that a defendant neither desired nor intended to bring about a particular result does not necessarily exonerate him. The law not unfrequently holds defendants liable irrespective of their intention to do harm; and in some extreme cases may even hold them liable irrespective of the utmost care on their part, practically making them insurers against all harm resulting from certain classes of acts. "When a responsible defendant seeks to escape from liability for an act which he had notice was likely to cause temporal damage to another, and which has caused such damage in fact, he must show a justification."[1] And this doctrine may be assumed to apply, even though he had no notice that his act was likely to cause damage to a specific person at a particular moment, but knew only that it was likely to cause damage to some unspecified person at some indefinite time. To escape liability, he must show that there are considerations equal or paramount to those urged in behalf of the plaintiff which justify his conduct notwithstanding the known risk of damage to others therefrom. He must sustain "a claim of privilege."[2]

On the other hand, the defendant justifies under his right or privilege to make a beneficial use of his own land in methods which will do no harm to persons remaining outside his boundary. The beneficial use of land is a primal necessity; not only to those individual landowners who happen to be defendants in lawsuits, but to the entire human race. "The business of life must go forward and the fruits of industry must be protected."[3] "It is impossible to carry on the common affairs of life without doing various things which are more or less likely to cause loss or inconvenience to others, or even which obviously tend that way; and this in such a manner that their tendency cannot be remedied by any means short of not acting at all. . . . To say that a man shall not seek profit in business at the expense of others is to say that he shall not do business at all, or that the whole constitution of society shall be altered. Like reasons apply to a man's use of his own land in the common way of husbandry, or otherwise for ordinary

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[1] Mr. Justice Holmes, 8 HARVARD LAW REVIEW, 9.

[2] See 8 HARVARD LAW REVIEW, 9.

[3] Cowen, J., in Loomis *v.* Terry, 1837, 17 Wendell, 496, p. 501.

and lawful purposes."[1] It is true that the right of user is never literally absolute, and is always restricted to some extent "by rights residing in others, and by duties incumbent on the owner."[2] But it is also true that every restriction diminishes *pro tanto* the beneficial character of the use; and hence the law imposes restrictions as seldom as possible, and never except upon the strongest grounds. If an opposite policy were pursued, it is easily conceivable that the improvement and beneficial occupation of land might become in fact impossible, and property in the soil for nearly all useful purposes might be annihilated.[3] To say, for instance, that B must keep his land in safe condition to be trespassed upon, would often result in practically depriving B of certain modes of beneficial enjoyment unless he takes precautions which are incompatible with profitable user, and might in effect amount to a confiscation of his land for the benefit of trespassers.

The difficulty of restricting the owner without practically destroying his interest is fully recognized by the law. It has been an important factor in inducing courts to refuse to impose restrictions in various instances where the case in behalf of the landowner is not so strong as in the matter now under consideration. We refer to the class of cases where the use of land, instead of harming only those persons who come upon the land, exerts a damaging influence upon persons and property situated beyond the border of the defendant's land. While there are, of course, many acts thus harmfully operating beyond the limits of his land for which an owner is held liable, there are also various acts of user which confessedly have a damaging effect upon persons and things outside the boundary of the land, and which nevertheless the law does not prohibit or punish.[4] "The fact that the damage is foreseen, or even intended, is not decisive, . . ."[5] And, by the weight of legal opinion, the motive of the landowner is not material. If the damage would not otherwise be actionable, it is not made so by proof that the owner was actuated by some motive other than a desire to beneficially use his own property; or even by proof that

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[1] Pollock on Torts, 2d Eng. ed. 133, 134.

[2] 2 Austin, Jurisp. 3d Eng. ed. 837, 825–6; Markby's Elements of Law, 3d ed. 155.

[3] See Bartlett, J., in Basset *v.* Salisbury Manuf. Co., 1862, 43 N. H. 569, p. 573.

[4] Rogers *v.* Elliott, 1888, 146 Mass. 349; Middlesex Co. *v.* McCue, 1889, 149 Mass. 103; Gibson *v.* Stewart, 1894, 21 Scotch Session Cases, 4th Series, 437.

[5] Holmes, J., in Middlesex Co. *v.* McCue, 1889, 149 Mass. 103, p. 104; and see Rogers *v.* Elliott, 1888, 146 Mass. 349.

he was actuated by a malicious motive to damage his neighbor.[1] The courts do not consider it for the interests of the community that the landowner who does not go beyond certain common and generally beneficial acts of user should be called upon to answer for damage thereby done, even where the thing damaged is outside the limits of his land.[2] And the majority of judges do not think that the owner should be exposed to the worry and expense of litigation at the hands of every suspicious person who may see fit to question his motive. "A different rule would lead to the encouragement of litigation, and prevent in many instances a complete and full enjoyment of the right of property which inheres to the owner of the soil. . . . Malice might easily be inferred sometimes from idle and loose declarations, and a wide door be opened by such evidence to deprive an owner of what the law regards as well-defined rights.[3]

As might be expected, the law, which is reluctant to impose restraint upon an owner's use of his land even when causing damage beyond his boundary, is still more unwilling to impose restraint upon modes of user which are dangerous only to persons who intrude upon the land. The two considerations, that the beneficial use of land is a necessity, and that such use cannot easily be restricted without very substantial damage (if not total deprivation) to the owner, have had great weight with the courts, so far as the case of adult intruders is concerned. The owner of land is not liable for the condition of his premises to an adult who enters

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[1] See Mahan *v.* Brown, 1835, 13 Wendell, 261; Jenkins *v.* Fowler, 1855, 24 Penn. State, 308; Chatfield *v.* Wilson, 1855, 28 Vermont, 49; Phelps *v.* Nowlen, 1878, 72 New York, 39; Falloon *v.* Schilling, 1883, 29 Kansas, 292; Corporation of Bradford *v.* Pickles, L. R. (1895) App. Cases, 587; affirming L. R. (1895) 1 Chan. 145; Mr. Justice Holmes, in 8 HARVARD LAW REVIEW, p. 4. See, however, the forcible criticism of Barrows, J., in Chesley *v.* King, 1882, 74 Maine, 164, pp. 171–177.

[2] The knowledge of the exceptional infirmity of a neighbor "introduces no limitation of the ordinary right" of user of property. If the right to use property depends on the effect upon persons of peculiar temperament, "the standard for measuring it would be so uncertain and fluctuating as to paralyze industrial enterprises." "Legal rights to the use of property cannot be left to such uncertainty." "A fluctuation in the duty respecting property would strike it with a sterility most baneful to national prosperity." Rogers *v.* Elliott, 1888, 146 Mass. 349; 1 Beven on Negligence, 2d ed. pp. 17, 18; Ladd *v.* Granite State Brick Co., New Hampshire, 1895, 37 Atl. Rep. 1041. If the plaintiff in Rogers *v.* Elliott, instead of being an adult of peculiar nervous susceptibility, had been a young child terrorized by the defendant's mode of using his land, the result would probably have been the same.

[3] Miller, J., in Phelps *v.* Nowlen, 1878, 72 New York, 39, pp. 45, 46. Compare Holmes, J., in Rideout *v.* Knox, 1889, 148 Mass. 368, p. 372.

thereon without permission. That this is the result of the authorities, is a proposition not likely to be disputed. Possibly, however, it may be claimed that the establishment of this doctrine is not consistent with other well settled legal principles. It may be urged that there is a class of cases where the duty of the landowner to use care for trespassers is fully recognized; that this recognition is repugnant to the above doctrine; that one doctrine or the other must be abandoned; and that legal symmetry requires that the principle of the last-mentioned class of cases should be extended by analogy so as to include and apply to both adult and childish intruders who meet with harm owing to the condition of the premises. "You have admitted," it may be said, "that it is the better view that the landowner, under certain circumstances, owes a duty of care to adult trespassers. Why not extend this doctrine by analogy so as to impose a duty of care in cases of the class now under consideration? If the landowner is under a duty to use care to refrain from affirmative acts bringing force to bear[1] upon a trespasser whose presence is known, why not also impose upon him the duty to use care to prevent the entrance of trespassers (adults as well as children) in future, or to use care to keep his premises in such condition as will prevent harm therefrom to future trespassers after entrance?" The answer is, that there is a wide difference between the two cases, both in the stringency of the reasons for establishing a duty, and in the degree of the burden which would thus be imposed upon the landowner. The first case is that of a known, present, and immediate danger; one which is imminent and reasonably certain to result in harm, unless the owner then and there does, or omits to do, some act, the doing or omitting of which would avoid the danger. In the second case the danger may be said to exist chiefly in anticipation; it depends on the course of future events, upon circumstances as yet unknown and fortuitous.[2] In the first case the duty imposed upon the landowner involves simply a temporary, generally only a momentary, interruption of his user; requires only temporary precautions; does not include a duty to put the premises in such condition as to prevent the recurrence of similar emergencies in future, but merely requires the use

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[1] Except for purposes of defence or expulsion.

[2] See phraseology used by Dixon, C. J., in discussing a somewhat different topic. Kellogg *v.* Chicago & N. W. R. Co., 1870, 26 Wisconsin, 223, pp. 257, 258.

of care in a present and known emergency.[1] In the second case the duty sought to be established is to guard against future dangers; it must frequently involve permanent changes in the mode of user; sometimes necessitating such expense and trouble as would be practically prohibitive of certain modes of user; and in some cases compelling the abandonment of all profitable use. There are some decisions[2] which go to the extent of holding that the landowner, under special circumstances, owes a duty to ascertain whether trespassers are present. But the existence of this alleged duty and the failure to perform it are material only when it is sought to hold the landowner liable for setting (or keeping) force in motion when the trespasser is actually present on his land. It has not been contended, so far at least as adult trespassers are concerned, that he is under obligation to prepare his land so as to prevent their future entrance, or so as to enable them in future to enter and occupy in safety. If I have reason to believe that adult tramps occasionally sleep in my meadow, and I start my mowing machine without looking ahead to see if any one is in the track of the proposed swath, some courts might hold me liable for running over a tramp if I could have avoided him by keeping a better lookout. But if I leave my machine in the field over night, and an intruder stumbles over it in the dark, no court is likely to hold me liable. He cannot maintain that I was bound to leave my land and chattels in such a condition as to render it safe for him to intrude and intermeddle. "There is a broad difference," said Mr. Justice Carpenter,[3] "between the case of a trespasser's meeting with an injury by reason of the dangerous condition of the defendants' prem-

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[1] "The obligation of the company and its operatives" to a trespasser on the railroad track "is not, then, pre-existing, but arises at the moment of discovery. . . . It excludes all inquiry respecting the character of the roadbed, cattle guard, locomotive, brake appliances, or other means of operation, or of the speed or manner of running the train up to the moment of notice, because no breach of positive duty is involved." It had been previously said that "the trespasser who ventures to enter upon a track for any purpose of his own assumes all risks of the conditions which may be found there." . . . Seaman, J., in Sheehan *v.* St. Paul & D. R. Co., 1896, 76 Fed. Rep. 201, pp. 205, 204. In International & G. N. R. Co. *v.* Lee, 1896, Texas, 34 Southwestern Rep. 160, it was *held*, that no duty rests on a railway company, in favor of the public who use its tracks as a footway, to keep its switches blocked in its private switchyards to lessen the chances of injury to pedestrians. See Akers *v.* R. R., 1894, 58 Minn. 540.

[2] As to the conflict of authority on this point, see *ante*, p. 350, note 1.

[3] Mitchell *v.* Boston & Me. R. R., 1894, New Hampshire, 34 Atlantic Rep. 674, p. 677.

ises, and that of an injury caused by the defendants' active intervention."[1]

Assuming, then, that the law is not only settled, but is also consistent, in holding that the owner of land is not liable for the condition of his premises to an adult who enters without permission, the next inquiry is: What difference is there between the case of the adult intruder and the child intruder? Are there considerations which do not exist in the case of the adult, and which, when put into the scale, ought to turn the balance in favor of the child?

The two prominent arguments are: (1) that the child is innocent; (2) that the child is incapable of protecting itself.

What force is to be allowed to these considerations; and do they, when estimated at their true value, outweigh the reasons against imposing liability upon the landowner?

Concede (what in some reported cases seems very doubtful) that the child is incapable of taking care, is too young to be negligent, and is entirely innocent of intent to do wrong. What then? Of course, the innocence of a plaintiff does not *per se* establish the fault of a defendant. The landowner cannot be liable, unless he owed to the child a duty which he has neglected. Should the law, in view of the innocence of the child, impose on the landowner the duty here in controversy?

No doubt there are cases where a defendant is rightly held liable to a child plaintiff when he would not be liable to an adult plaintiff under similar circumstances. Where it is admitted that a duty exists to use care to avoid harm to both children and adults, (e. g., in the use of the public highway), then, in point of fact, more care may be required towards a child than towards an adult. In view of the child's helplessness and unconsciousness of danger more care may, as matter of fact, be required under the unvarying legal rule of "due care under the circumstances;" just as more care, in fact though not in law, may be required to avoid colliding with an obviously lame or blind adult than with a vigorous man in full possession of all his faculties.[2] But all this is true only

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[1] Attention has already been called, *ante*, p. 351, n. 1, to the fact that in a great majority of the attempts to hold the landowner liable, the child was not harmed by the landowner's setting force in motion or keeping force in motion while the child was on his premises. On the contrary, the child was harmed by coming in contact with objects which were at rest, or with objects set in motion by himself or his companions.

[2] A similar result might ensue in the case of an express license. The licensor owes the same duty to a child licensee as to an adult licensee: viz., to give warning of con-

where it is admitted or proved that a duty exists. "In considering the question as to whether a duty exists, there is no distinction between the case where an infant is injured and one where the injury is to an adult, though where the duty is imposed the law may exact more vigilance in its discharge as to the former."[1] So if it be conceded or proved that the defendant was negligent, and that his negligence constituted part of the legal cause of the plaintiff's damage, then the incapacity and immaturity of a child plaintiff may furnish a good answer to the defence of contributory negligence. Conduct of the plaintiff which would have been negligent in an adult may not be held negligent in a child. But the fact that the child plaintiff was not "capable of contributory negligence" does not necessarily establish that the adult defendant was negligent. It does not *per se* prove that the defendant owed to the plaintiff a duty, or that he failed to perform a duty. "If there was no breach of duty, then there was no wrong, irrespective of the boy's capacity to know that what he was doing was dangerous."[2] "The fact that injury has resulted, and to a child himself incapable of negligence, will not import the negligence of the defendant, which is the sole ground of liability."[3] Obviously, cases of the two foregoing classes do not furnish arguments from analogy in favor of creating a duty towards children in situations where no duty at all would exist towards adults.

Why should innocent children have greater rights than innocent adults, in respect to damage resulting from the nature of the premises upon which they enter without permission? Remedy against the landowner for harm happening from the condition of the premises is denied to adults who are entirely free from intent to violate rights, and whose presence upon the land is due to pardonable mistake or to irresistible external force. The test is not whether their motives were innocent or even laudable, or whether their conduct was careful, but whether they entered without the

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cealed dangers known to himself. But a danger which would be readily apparent to the average adult might be non-apparent to a child; and hence warning might be due to the latter, and not to the former.

[1] Denman, J., in Dobbins *v.* Missouri, etc. R. Co., Texas, 1897, 41 Southwestern Rep. 62, pp. 62, 63.

[2] Lurton, J., in Felton *v.* Aubrey, 1896, 74 Fed. Rep. 350, p. 353.

[3] 1 Beven on Negligence, 2d ed. 183. See also Breaux, J., in Culbertson *v.* Crescent City R. Co., 1896, 48 La. Ann. 1376, p. 1380; Vanderburgh, J., in Emerson *v.* Peteler, 1886, 35 Minn. 481, p. 484; Cockrill, C. J., in Catlett *v.* St. Louis, etc. R. Co., 1893, 57 Arkansas, 461, p. 465.

owner's permission. If so, they cannot claim that the owner was under a duty to make things safe for their access, or to give warning of non-apparent danger.[1] It may possibly be suggested that an adult trespasser is barred upon grounds inapplicable to a childish intruder. It may be urged that the adult is barred by his own wrong: both (1) because he must always be regarded as guilty of contributory negligence; and (2) because, even if not negligent, he is a tortfeasor in the technical sense; whereas a young child may be incapable of negligence and ought not to be regarded as even technically a tortfeasor. But this argument entirely misconceives the true reason why an adult trespasser fails to recover in the case supposed. The decision turns, not upon the presence of fault in the plaintiff, but upon the absence of fault in the defendant. The plaintiff's action is defeated, not because his own wrong bars a recovery against the landowner who has neglected to perform a duty owing to him, but because he has not succeeded in establishing the primary proposition that the landowner owed to him the duty in question. His trespass is not necessarily and always a negligent act, and hence does not invariably bar him on the ground of contributory negligence.[2] Nor does his tort, even when he is a conscious and morally inexcusable trespasser, prevent his recovering against the landowner for negligently bringing force to bear upon him by a positive act done after his entry, i. e., by what Clerk & Lindsell[3] call "a negligent act of commission." But when an adult who entered without permission seeks to recover against the landowner for harm happening from the condition of the premises, he fails even though he were morally blameless. He may be a technical tortfeasor, but recovery is not denied to him by way of punishment for his own "wrong." He fails because the landowner owed him no duty to have the premises in safe condition for his entry.[4] Why should the moral innocence of a childish intruder raise a duty on the part of the landowner which is not created by the moral innocence of an adult intruder? The youthful innocence of the child does not make restrictions on the right of user less damaging to the owner, or make the alleged duty of preventing the entrance of an in-

[1] See Barrows, J., in Morgan *v.* Hallowell, 1869, 57 Maine, 375, p. 377; Woodward, J., in Gramlich *v.* Wurst, 1878, 86 Pa. State, 74, p. 78.

[2] 1 Shearman & Redf. Negl. 4th ed. ss. 97, 98.

[3] 2d ed. 14.

[4] See Shearman & Redfield, *ubi supra.*

truder or of protecting him from harm after entry less burdensome, than in the case of an adult. Indeed, the duty would be more onreous in the case of a child.

It may, however, be urged that there are two particulars in which the case of the innocent child intruder can be distinguished from that of the innocent adult intruder. One distinction is, that the innocent intrusions of children are likely to occur more frequently, and to result in more serious damage, than the innocent intrusions of adults. This hardly affords ground for applying a different rule of law to the two cases. The other distinction is, that, in the class of cases now under discussion, the occasional innocent intrusion of the children is, *ex hypothesi*, the foreseeable result of the manner in which the landowner has chosen to make a beneficial use of his premises. In a certain sense, the innocent child may be said to have been "attracted" to the premises by the acts of the landowner; which is not generally true in the case of the innocent adult intruder. Looking at the matter solely from the standpoint of the child and considering solely his interest, the above considerations might prove entirely decisive. But the controversy cannot be decided without also looking at the matter from the standpoint and interest of the landowner, and giving due weight to his alleged justification. And when we look at it from his standpoint, we find that, *ex hypothesi*, the so-called "attractions" were placed on the land for his own business purposes; that their presence is reasonably necessary to carry out those purposes; and that his mode of using the land is confessedly lawful and proper, unless rendered otherwise in the eye of the law by their tendency to attract children and to endanger those yielding to the attraction. When the matter is thus viewed from both sides, we are simply brought back to the general question already stated:[1] whether the danger of occasional harm, under such circumstances, to innocent children outweighs the benefit to the community of leaving owners unfettered in making a beneficial use of their land in methods which cause no damage to persons outside their boundary. Our own impression is that it does not.

It has sometimes been (apparently) assumed that the exoneration or liability of the landowner must depend upon the question whether an action of trespass *quare clausum fregit* could have been maintained against the child. The weight of authority is in

[1] *Ante*, p. 360.

favor of the view that a young child, even though not capable of negligence, is liable in trespass for an unauthorized entry.[1] But concede, for the sake of argument, that the child is not liable to be sued as a tortfeasor. Assume that a use by the owner of his property which has the unintended effect of attracting the child, constitutes a defence to an action of trespass against the child. Does it follow that the child has all the rights of an invited person or an express licensee? Does the above assumption necessitate the conclusion that his entry upon the land of another is a matter of right, to be protected and encouraged by the law, and hence imposing upon the landowner the special duty of preparing his land in advance for the safety of future childish intruders? In many of our States (contrary to the English common law) the entrance of animals upon unenclosed land does not make their owner liable in trespass *quare clausum fregit.* But the owner of the animals has no right (of entry or pasturage) "which can be demanded and enforced." There is "only an immunity from suit or punishment." The landowner is under no obligation to keep his premises in safe condition for the invasion of his neighbor's animals. If the animals are hurt by bringing themselves in contact with the soil, or with stationary objects thereon, the landowner is not liable.[2]

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[1] Cooley on Torts, 2d ed. 120; Clerk & Lindsell on Torts, 2d ed. pp. 37, 38; 1 Shearman & Redfield on Negligence, 4th ed. s. 98; Ames's Cases on Torts, 2d ed. 66, note 1. Compare Sherwood, J., in Barney *v.* H. & St. J. R. Co., 1895, 126 Missouri, 372, p. 392.

[2] Knight *v.* Abert, 1847, 6 Pa. State (6 Barr), 472; Hughes *v.* Hannibal & St. J. R. Co., 1877, 66 Missouri, 325; St. Louis, etc. R. Co. *v.* Ferguson, 1892, 57 Arkansas, 16. And see Valentine, J., in U. P. R. Co. *v.* Rollins, 1869, 5 Kansas, 167, pp. 177, 178.

There are cases where railroad companies have been held liable for the death or maiming of animals alleged to have been attracted to the railroad track by such substances as salt, cottonseed, or molasses, which the company allowed to be placed in an accessible situation, and which were permitted to remain so exposed for a considerable time. Crafton *v.* H. & St. J. R. Co., 1874, 55 Missouri, 580; Morrow *v.* H. & St. J. R. Co., 1888, 29 Missouri Appeals, 432; Page *v.* N. C. R. Co., 1874, 71 Nor. Car. 222; Railway *v.* Dick, 1889, 52 Arkansas, 402. But in none of these cases was the death of the animal directly due to eating the substances thus exposed. In every case the animal was killed or crippled by force actively brought to bear upon it by the railroad company in the management of the trains. And it would seem that there was, in one or more of the cases, fair reason to hold the company on the ground that this active force was negligently exerted. Having done something which they had reason to believe would attract animals to a particular part of the track, it may plausibly be argued that the railroad employees should have been on the lookout for their presence, and are liable for a collision if they could have avoided it by seasonably obtaining knowledge of the presence of the animals. This would certainly be so in States where the landowner is held to be under a duty, when setting force in motion, to

The child, it is said, is incapable of protecting itself; and hence it is eloquently contended that the law must impose the duty of protection upon landowners. The apparent assumption is, that all the children in the world are mere waifs and strays, and that the duty of caring for them must be imposed upon the landowners because the law can find no one else to bear the burden.[1] The fact is, that the vast majority of children have protectors appointed alike by nature and by law, viz., their parents, who have legal power to control their actions, and whose moral duty to keep their children from entering upon dangerous premises is generally regarded as at least equal to the moral obligation of the landowner to fence them out. If the child, upon entering on the premises, is hurt by the "active negligence" of the owner in bringing force to bear upon him, it may well be that the negligence of the parent in failing to restrain the child's entrance does not bar the child's recovery for the force thus brought to bear upon him after his

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use reasonable care to discover trespassers. And even in States where that duty is not generally recognized, an exception might be allowed in cases where the landowner knows that his own acts are likely to attract animals to a particular spot. Unquestionably the *language* used in some of these opinions tends to favor the claim of the child against the landowner in the hypothetical case under discussion in this article. Looking, however, to the point actually *decided*, these cases do not establish the liability of the landowner for harm suffered by an animal's bringing itself in contact with "attractive" substances on the land; but only for harm done by the landowner's bringing force actively to bear upon the animal. It should be added that, even in States adopting the foregoing decisions, it would seem that the railroad company are not liable by reason of the attractiveness of the substances exposed, if such exposure took place in the reasonable and usual course of business, and was not continued for an unnecessary time. Thus it is a justification for the railroad company that the salt which attracted the animals was used in thawing out switches, if such use was necessary to the proper operation of the road. Louisville, etc. R. Co. *v.* Phillips, 1893, Mississippi; S. C. 12 Southern Rep. 825; Kirk *v.* Norfolk, etc. R. Co., 1896, 41 West Va. 722. And see Schooling *v.* St. L. etc. R. Co., 1882, 75 Missouri, 518.

[1] See, for instance the language of Mr. Justice Agnew in Hydraulic Works Co. *v.* Orr, 1877, 83 Pa. State, 332, p. 336. ". . . the mind, impelled by the instinct of the heart, sees at once that in such a place, and under these circumstances, he" (the landowner) "had good reason to expect that one day or other some one, probably a thoughtless boy in the buoyancy of play, would be led there, and injury would follow. . . . Perhaps the best monitor in such a case is the conscience of one who feels, in his dreadful recollection, the crushing sense that he had left such an engine of ill to take the life of an innocent child. . . . The common feeling of mankind, guided by the sacred heart of the great law of love, and the common-sense of jurors, must be left, in such a case, to pronounce upon the facts."

It will be noticed that, in the above passage, there is no suggestion that there is any person other than the landowner upon whom the law imposes the slightest responsibility for the child's safety; much less that there is another person who is primarily responsible therefor.

entrance. But it is going far beyond this to say that the child can recover for harm sustained by him through the condition of the premises, without the immediate intervention of any human agency save his own.[1] When a child wakes up in the morning in his father's house, the duty of providing a safe playground for him during the day rests upon his parents. Is this duty shifted from the parent to private landowners because the child chances to escape from the parent's care?[2] If those who brought the child into the world are unable, by reason of poverty, to provide him a playground, this may afford an argument for the passage of a statute imposing that duty upon the municipality, in which case each landowner would have to contribute his proportion of the expense. But this is quite another thing from assessing upon a single unfortunate landowner the entire damage arising from the want of such a playground.[3]

Even if it be conceded that the child cannot maintain a civil action against his parents to recover damages for their neglect to guard him from harm,[4] still the parental duty, created by nature, and certainly recognized to some extent by law, cannot be ignored in determining whether to impose a legally enforceable duty upon landowners to keep their premises in safe condition for the entrance of uninvited children. If it be urged that children are so largely guided by sudden impulse that it is impossible for parents always effectually to protect them, two answers may be made: First, the parents can, in fact, protect the children in the great majority of instances. Second, if the duty is so impossible

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[1] "It may be entirely consistent with sound morals and proper regard for the rights of others that the owner of premises should not be held liable to one who goes upon another's premises for his own uses, and sustains some injury by reason of the unfitness of the premises for such uses, not subsequently brought about by the active interference of the owner." Lurton, J., in Felton *v.* Aubrey, 1896, 74 Fed. Rep. 350, p. 359.

[2] See Allen, J., in Clark *v.* Manchester, 1882–1883, 62 N. H. 577, p. 580; and compare Finley, J., in Missouri, etc. R. Co. *v.* Dobbins, 1896, Texas, 40 S. W. R. 861, p. 864.

[3] "It is hard, no doubt, upon poor people who cannot afford to hire persons to look after their children and to keep them out of danger, that their little ones are exposed to more risk than those of others, but I cannot see that the burden of protecting such children should on that account be laid on the neighboring proprietors. . . ." Lord Justice Clerk Macdonald, in Ross *v.* Keith, 1888, 16 Scotch Session Cases, 4th Series, 86, p. 89.

[4] Upon the general subject of civil remedy by children vs. parent, for negligence, or for infringement of personal right, see 1 Beven on Negligence, 2d ed. 199–202; 4 Am. Law Rev. 410, 411, 413, 415; Hewlett *v.* George, Ex'r of Ragsdale, 1891, 68 Mississippi, 703; Johnson, J., in Street R. Co. *v.* Eadie, 1885, 43 Ohio State, 91, p. 98.

of performance that it would be a hardship to impose it upon the parents, it seems unfair to impose it upon the landowner, whose knowledge of the characteristics of any particular child cannot be equal to that possessed by its parents.[1] It is hardly too much to say that the doctrines enumerated in some cases, if carried to their logical conclusion, "would charge the duty of the protection of children upon every member of the community except their parents."[2]

The point now under consideration differs widely from the vexed question whether the concurring negligence of the parent should be held to bar the child's remedy against a confessedly negligent third person, e. g., one who carelessly collides with the child while the latter is in the custody of the negligent parent on a public highway. The question there is, whether a confessedly negligent defendant, whose negligence constitutes in part (at least) the legal cause of the child's damage, should be permitted to set up in defence to the child's action the contributory negligence of the parent. In that case it is conceded that a legal duty rested on the defendant, and that he failed to perform it. The only doubt in such a case is, whether he should be permitted to escape liability by reason of the concurring fault of the parent. But here the very question at issue is whether any duty rested upon the defendant; i. e., whether the law ought to impose a duty upon him. And in deciding that question it is fair to weigh the fact that the moral fault of the parent is, in a great majority of cases, one of the antecedents in the chain of causes leading up to the catastrophe.[3]

Jeremiah Smith.

[*To be continued.*]

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[1] According to some cases it would seem that the duty of the landowner to keep his premises in safe condition for the intrusion of children rises in proportion as the parents of those children neglect their own duties to their offspring. But "the mischievousness of children in a particular district and the absence of restraint on their proclivities seem somewhat peculiar grounds on which to raise a legal liability" of the above description. See 1 Beven on Negligence, 2d ed. 184, note 1.

[2] Paxson, J., in Gillespie *v.* McGowan, 1882, 100 Pa. State, 144, p. 151. See also Mitchell, J., in Twist *v.* Winona R. Co., 1888, 39 Minn. 164, p. 167; and Finley, J., in Missouri, etc. R. Co. *v.* Dobbins, 1896, Texas, 40 S. W. R. 861, p. 864.

[3] It is also true in a large proportion of cases that the parent practically gets the pecuniary benefit of the judgment recovered in the name of the child or on behalf of the child's estate.